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Nos. 82-1453 and 82-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST BADARACCO, SR., *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DELEET MERCHANDISING CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER, DELEET MERCHANDISING CORP.

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Question Presented

Does the subsequent filing of a complete and honest amended return start the running of the statute of limitations provided in Section 6501(a) as Taxpayer contends, or does the filing of an allegedly fraudulent return give the Government the right in perpetuity to assess deficiencies and penalties—no matter what remedial steps are taken by the taxpayer—as the Government contends?

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BRIEF FOR PETITIONER, DELLET MERCHANDISING CORP.

Opinions Below

The opinion and order of the District Court for the District of New Jersey, dated and entered December 22, 1981, is reported at 535 F.Supp. 402. A copy of that opinion is reproduced at page 1d of the Appendix filed as part of Petitioner's Petition for a Writ of Certiorari. The opinion of the Court of Appeals for the Third Circuit, dated November 29, 1982, is reported at 693 F.2d 298 and reproduced at page 1a of the Appendix to the Petition.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on November 29, 1982. (PA -2b)[1] A petition for rehearing and for rehearing *en banc* was denied on December 23, 1982. (PA -1c) The Petition for a Writ of Certiorari was filed with this Court on March 11, 1983 and an order granting said petition was entered on May 16, 1983.

Applicable Statute

Section 6501 of the Internal Revenue Code of 1954, as amended, provides in pertinent part:

> "§6501(a) GENERAL RULE—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3

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[1] Parenthetical references (PA -) are to the Appendix filed as part of Petitioner's Petition for a Writ of Certiorari. Parenthetical references (JA -) are to the Joint Appendix filed in this matter.

years after the return was filed (whether or not such return was filed on or after the date prescribed) * * * and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

* * *

(c) EXCEPTIONS—

(1) FALSE RETURN—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by sub-title A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time.

(3) NO RETURN—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Statement of the Case

A. Nature of the case.

The petitioner Deleet Merchandising Corp. (hereinafter sometimes referred to as the "Taxpayer"), is a New Jersey corporation. The respondent is the United States of America (hereinafter referred to as the "Government"). The Taxpayer timely filed its corporate tax return for

calendar years 1967 and 1968. On August 9, 1973, Petitioner voluntarily filed amended returns for those years. (JA -55a-56a) On December 21, 1979 (more than 6 years subsequent to the filing of Taxpayer's amended returns), the Internal Revenue Service issued a Notice of Deficiency (JA -71a). The issue to be resolved is whether Petitioner's filing of honest and complete amended tax returns in 1973 commenced the running of the three year statute of limitations of Internal Revenue Code Section 6501 (a), 26 U.S.C. §6501(a).

B. Procedural history.

On January 4, 1980, after paying the amounts assessed by the Government, Petitioner commenced this action by filing its Complaint in the United States District Court for the District of New Jersey. The complaint alleged that the Government erroneously and illegally assessed corporate income taxes and penalties totalling $38,604.00 for 1967 and $75,589.93 for 1968, and demanded judgment in those amounts, with interest as provided by law. (JA -44a-47a) On March 21, 1980, the Government filed its Answer, which denied that the assessments were erroneous or illegal. (JA -49a-51a)

On December 14, 1981, the Petitioner moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment, on the ground that the assessment of tax by the Government was time barred under the three year limitation in Subsection 6501(a) of the Code. (JA -52a)[2] The Government opposed on the ground that notwithstanding the filing of complete amended returns,

[2] All references herein to "Code" are references to the Internal Revenue Code of 1954, as amended, unless otherwise stated.

the allegedly fraudulent nature of the original returns entitled it to make its assessment without regard to any period of limitation.[3]

By opinion and order dated and entered December 22, 1981, the District Court (Fisher, Chief Judge) granted Summary Judgment in favor of the Petitioner, holding that the Petitioner's filing in 1973 of complete, accurate and nonfraudulent amended income tax returns for the years 1967 and 1968 commenced the running of the three-year limitations period provided in Subsection 6501(a) of the Code. (Reported at 535 F.Supp. 402 (1982) (PA -1d))

On February 18, 1982, the Government filed its Notice of Appeal to the United States Court of Appeals for the Third Circuit. (JA -79a) On November 29, 1982, a divided Court of Appeals reversed the District Court. The majority held that under the literal terms of Subsection 6501(c)(1) the Government had a right in perpetuity to assess taxes and deficiencies against the Petitioner. (Reported at 693 F.2d 298 (3d Cir. 1982) (PA -1a)). Petitioner's petition for rehearing and rehearing *en banc* was denied by the Court of Appeals on December 23, 1982. (PA -1c)

On March 11, 1983, the Petitioner filed a Petition for a Writ of Certiorari with this Court which was granted by order entered on May 16, 1983.

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[3] The Government's allegation that the original returns were fraudulent has never been adjudicated The District Court noted that the fraudulent or nonfraudulent nature of those returns was irrelevant and had no bearing on the legal issue presented. (PA -5d)

C. Relevant facts.

There are no disputed facts in this case and the issue to be determined is exclusively one of law.[4]

It is agreed that Petitioner timely filed its corporate income tax returns for the years ending December 31, 1967 and December 31, 1968 (the "original returns") and paid the taxes shown to be due. (PA -4a)

On August 9, 1973 the Taxpayer, at a time when it was not subject to any criminal or civil investigation by the Government, filed amended tax returns for the tax years 1967 and 1968 (the "amended returns"). (JA -54a, 56a) The amended returns were accepted for filing by the Government and were completely accurate. (JA -76a) The amended returns show a refund due to Taxpayer of $6,206.00 for 1967 and an additional tax of $36,314.01 for 1968. (JA -57a-70a, 71a)

On December 14, 1979, more than six years after the amended returns were filed, the Government issued a Notice of Deficiency. (JA -71a) The Notice of Deficiency, which was based upon the information provided by Taxpayer in the amended returns, disallowed Taxpayer's 1967 refund claim and assessed a deficiency of $25,248.00 and penalties of $13,356.00 for that year. With respect to 1968 the Notice of Deficiency assessed $36,314.01 as additional tax and penalties of $39,275.82. (JA -71a) On or about December 27, 1979, the Taxpayer paid the deficiencies and penalties assessed. (JA -55a)

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[4] The Government submitted no affidavits or documentation to the District Court in opposition to the Petitioner's Motion for Summary Judgment. Thus, all facts set forth in the Petitioner's affidavit submitted in the District Court must be accepted as true.

Summary of Argument

The statute of limitations set forth in Subsection 6501(a) of the Code bars the assessment or collection of any tax deficiencies from Taxpayer for the taxable years 1967 and 1968. Assuming *arguendo* that Taxpayer's original returns for those years were fraudulent, the subsequent filing by Taxpayer in 1973 of complete and honest amended returns for those tax years commenced the running of the three-year limitations period. The purpose underlying the enactment of statutes of limitations generally, and Section 6501 specifically, offers no other conclusion. Once a taxpayer has placed into the hands of the tax authorities the accurate information necessary to enable the Government to properly make an assessment, that taxpayer is entitled to the repose afforded by the statute of limitations enacted by Congress for that very purpose.

The Government has consented to and acknowledged that a taxpayer who fraudulently fails to file a return may nevertheless commence the limitations period under Section 6501(a) by subsequently filing a nonfraudulent "delinquent" return. No real distinction exists between that situation and the initial filing of a fraudulent return which is subsequently followed by the filing of an honest amended return.

The attempt by the Government to draw a distinction, for limitations purposes, between "amended" returns and "delinquent" returns is unfounded. Each such return is an embodiment of the taxpayer's attempt to rectify an earlier transgression. In each instance the taxpayer is correcting earlier acts, which are insufficient to commence any period of limitation with respect to the Government's power to assess. The Government nevertheless continues to attempt to draw such a distinction by resorting to the

most technical of arguments. The argument advanced by the Government in opposition ignores the true nature of the taxpayer's subsequent voluntary filing and attempts to diminish the corrective nature of this act by elevating form over substance. Thus, its argument that "amended" returns are not authorized by statute ignores the fact that such amended returns are not only encouraged by the Government but are submitted on the very form supplied by the Government.

Petitioner urges that the statute under consideration be interpreted in accordance with its intended purpose. Subsection 6501(a) is a general statute of limitations. Subsection 6501(c) sets forth exceptions to the general rule, and is therefore not in and of itself a statute of limitations. Thus, when the taxpayer files either a "delinquent" or honest "amended" return, the exceptions embodied in Subsection 6501(c) are no longer operative and the limitation period begins to run. In sharp contrast, the Government advocates a most tortured construction which would grant priority to an exception at the expense of the statutory general rule.

The Government submits that the voluntary filing of an amended return by a contrite taxpayer does not deprive the Government of its rights to assess the tax in perpetuity. This contention is not only unfair to the individual taxpayer, but is also not in the Government's best interests, for it dissuades the individual taxpayer from re-evaluating his prior acts and coming forth and voluntarily filing an amended return and paying the additional tax that may be due. Further, the Government would have this Court establish one rule for those taxpayers who seek to evade payment of their tax by failing to file a return, and a separate and far more oner-

ous rule for those who file fraudulent returns and subsequently file honest amended returns. Taxpayer submits that this would result in giving preferential treatment to one form of tax fraud over another.

The alleged policy considerations based upon bureaucratic difficulties urged by the Government are without the benefit of legislative imprimatur, in specific instances have no relationship to the facts in this case and do not justify the relief the Government requests. The position Taxpayer advocates is fair and reasonable and the equity underlying Taxpayer's position is apparent. Certainly, all taxpayers who have voluntarily discharged their reporting obligations should be accorded the equal treatment that Congress intended.

For the above stated reasons the decision of the United States Court of Appeals for the Third Circuit should be reversed and the judgment of the United States District Court for the District of New Jersey in favor of the Petitioner should be reinstated and affirmed.

LEGAL ARGUMENT

I. The underlying purpose of Section 6501 dictates that the limitations period commenced upon the filing of an honest and complete amended return.

This case rests entirely on the meaning and operation of a statute of limitations—specifically whether Subsection 6501(a) of the Code bars the assessment and collection of tax deficiencies more than three years after a taxpayer filed complete and honest amended tax returns. Subsection 6501(a) limits the period during which the Government may assess or institute an action to collect tax without assessment, to "3 years after the return was filed (whether or not such return was filed on or after the date prescribed.)"

Subsection 6501(a), which is the general rule, is augmented by several exceptions contained in Subsection 6501 (c). This dispute focuses on the operation of the exception set forth in Subsection 6501(c)(1) which provides "[i]n the case of a false or fraudulent return with the intent to evade tax, a proceeding in court for collection of such tax may be begun without assessment, at any time." The Government contends that this provision is controlling and that the filing of false or fraudulent original returns entitles it to an infinite period in which to assess, no matter what remedial steps the taxpayer undertakes.

On August 9, 1973, the Taxpayer voluntarily and at a time when it was not the subject of either a civil or criminal investigation by the Government (JA -56a) filed amended returns for the years 1967 and 1968. For purposes of these proceedings it has been assumed that the original returns filed by Taxpayer for the years 1967 and 1968 fell within the terms of Subsection 6501(c)(1) so that the statute of limitations contained in Subsection 6501 (a) did not begin running when those returns were filed.

The amended returns filed in August of 1973 were honestly made and corrected any errors (fraudulent or otherwise) in the original returns. The Government accepted Taxpayer's amended returns and the Taxpayer's remittance accompanying the returns but did not seek to assess or otherwise collect tax deficiencies until more than six years after Taxpayer filed the amended returns (JA -54a-55a). Petitioner submits that the three-year limitations period established by Subsection 6501(a) commenced to run when Petitioner provided the Government with complete, correct and accurate information as to the taxable events that occurred in 1967 and 1968, and thereby removed the bar previously imposed by the statutory exception of Subsection 6501(c)(1).

While the statutory exception in the instant case is Subsection 6501(c)(1), there is another relevant exception to the general rule enunciated in Subsection 6501(a). This other exception is significant since its interpretation sheds light on the purpose of the entire statutory scheme. This most important other exception is Subsection 6501(c)(3), which is directed at the failure to file a return. As is the case with the filing of a false or fraudulent return, when a taxpayer fails to file any return the Government is without the benefit of accurate facts relating to a taxpayer's income and expenses. Subsection 6501(c)(3) therefore provides in language that duplicates the exception of Subsection 6501(c)(1) that "[i]n the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Petitioner submits that just as the operative language of Subsections 6501(c)(1) and (c)(3) is identical, the purpose of the subsections is also identical and they should be interpreted consistently with one another and with the

purpose underlying statutes of limitation generally. Once a taxpayer has provided the information upon which the Government may make a knowledgeable assessment, the justification for suspending the limitations period is no longer viable and must yield to the favored policy of limiting the Government's time to proceed against the taxpayer. *Dowell* v. *Commissioner*, 614 F.2d 1263 (10th Cir. 1980); *Britton* v. *United States*, 532 F.Supp. 275 (D.Vt. 1981), *aff'd without opinion* (2d Cir. No. 816246, April 15, 1982); *Bennett* v. *Commissioner*, 30 T.C. 114, (1958), *acq.*, 1958-2 C.B. 3.

As this Court has stated, the major purpose of a statute of limitations is to:

> "assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965). *See also, Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 348-349 (1944); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 561 (1974) (concurring opinion).

Moreover, it has long been established that:

> Statutes of limitations are founded on sound policy. They are statutes of repose and should not be evaded by a forced construction. *Pillow* v. *Roberts*, 13 How. 472, 477 (1851). *See also, Clementson* v. *Williams*, 8 Cranch 72, 74 (1814).

The very same considerations of fairness led Congress to limit the period of time in which the Government may assess federal tax deficiencies. There has been no

manifestation of a Congressional policy in favor of an unlimited assessment period. *Bennett* v. *Commissioner*, 30 T.C. 114, 123-24 (1958), *acq.*, 1958-2 C.B. 3. Congress has determined that a taxpayer who has furnished the Government with a complete and honest return is entitled to repose after a finite period. After that period has elapsed, the taxpayer is assured that his tax liability cannot be reopened. *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304 (1940); *Mabel Elevator Co.* v. *Commissioner*, 2 B.T.A. 517, 519 (1925), *acq.*, VI-1 C.B. 4.

Just as Congress has granted to the taxpayer a limitations period based on sound principles of fairness, it has balanced that policy by affording the Government protection from taxpayer abuse. This is accomplished by depriving the errant taxpayer of the repose of the limitation period ordinarily granted when the taxpayer has deliberately failed to provide the information which would enable the tax authorities to detect errors and misstatements in taxpayer's return within the allotted period. Thus, the period of limitations enacted in Subsection 6501(a) of the Code is wholly suspended in the three circumstances set forth in Subsections 6501(c)(1), (c)(2) and (c)(3).[5]

Each exception contemplates conduct on the part of the taxpayer which deprives the Government of the accurate information necessary to determine the tax, either because the taxpayer did not file his return or filed a return in which the information was false and fraudulent. *See, e.g., Klemp* v. *Commissioner*, 77 T.C.

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[5] Subsection 6501(c)(2) permits the Government to assess at any time in the event of "a willful attempt in any manner to defeat or evade tax." By its terms, however, this exception is not applicable to the income tax.

201, 205-206 (1981) (reviewed by the entire court), *appeal docketed*, No. 81-7744 (9th Cir.); *Bennett* v. *Commissioner; Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 36 (1958).

The soundness of such an approach cannot be seriously contested. There exists no constitutional right to a statute of limitations. The enactment of such a statute is solely within the discretion of the legislature. Having successively enacted statutes of limitation in every Internal Revenue Code since 1921, Congress supplemented that general legislation on each occasion by additionally providing that no limitations period shall commence in the case of a taxpayer who filed a return that was intentionally false and misleading or who failed to file a return.[6] It is not a question of whether a statute of limitations has been tolled. Rather, Congress has decreed that the statute of limitations does not even start for that period during which the taxpayer has failed to provide the Government with accurate information.

The Government contends that the suspension of time provided in Subsection 6501(c)(1) lasts forever (or at least until the Internal Revenue Service makes an assessment). That construction is not only unfair to the individual taxpayer, but shortsighted in terms of the Government's own interest, in that it would dissuade taxpayers from voluntarily coming forth and filing amended returns. Petitioner submits, however, that Subsection 6501

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[6] *See* Sections 275 and 276 of the Internal Revenue Code as restated by Sections 277 and 278 of the Revenue Act of 1924; Sections 277 and 278 of the Revenue Act of 1926; Sections 275 and 276 of the Revenue Act of 1928; Sections 275 and 276 of the Revenue Act of 1932; Sections 275 and 276 of the Revenue Act of 1934; Sections 275 and 276 of the Revenue Act of 1936; Sections 275 and 276 of the Revenue Act of 1938. *See also* Sections 275 and 276 of the Internal Revenue Code of 1939 and Section 6501 of the Internal Revenue Code of 1954.

(c)(1) should be construed according to its purpose, i.e., to deny to the taxpayer the benefits of a statute of repose for that period during which he has failed to discharge his legal obligation of providing the Government with a complete and accurate statement of his income, deductions and credits.

As Justice Brandeis stated in *Florsheim Bros. Drygoods Co.* v. *United States*, 280 U.S. 453 (1930):

> "The burden of supplying by the return the information on which assessments were based was thus imposed upon the taxpayer. And, in providing that the period of limitations should begin on the date when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner." 280 U.S. at 460

The purpose of the Congressional enactment of exceptions to Subsection 6501(a) is consistent with the decision in *Florsheim Bros.* Until the taxpayer has discharged his obligation under law to provide the Government with a complete and accurate statement of his income and expenses, the Government's right to contest the taxpayer's calculations does not become subject to a limitations period. The bar to the Government's right to assess the taxpayer is indefinitely held in suspense, or as stated in the operative language of Subsections 6501(c)(1) and (3), the Government may assess or seek to collect the tax it claims due *"at any time."* When, however, the taxpayer does discharge his obligation by supplying the Government with the required information the limitations period begins running. As stated in *Bennett* v. *Commissioner:*

> "For, once a nonfraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. We think that the statute of limitations begins to run with the filing of such returns." 30 T.C. at 123-24.

When, as in the instant case, the taxpayer files an honest return, be it amended or original, the Government has available to it all of the information that is required to allow it to assert its claim for any unpaid tax. Once the taxpayer has placed that information in the Government's hands, the justification for continuing the suspension of the limitations period loses its vitality, unless it can be shown that Congress intended the suspension of the limitation period as a punitive measure.

That suggestion was considered and rejected in *Klemp* v. *Commissioner; Dowell* v. *Commissioner; Britton* v. *United States; Bennett* v. *Commissioner.* Where Congress intended to impose punitive measures in the Code it has affirmatively done so in clear and precise language. Thus, in enacting Subsection 6653(b) of the Code, Congress imposed a 50% additional fraud penalty on the difference between the true tax liability and the amount shown on the original return. The taxpayer is subject to this fraud penalty upon the filing of a fraudulent return regardless of the filing of amended returns, provided the same is assessed within the statutory period. *See, e.g., George M. Still Inc.* v. *Commissioner,* 19 T.C. 1072, *aff'd.,* 218 F.2d 639 (2d Cir. 1955); *Eck* v. *Commissioner,* 16 T.C. 511 (1951), *aff'd.,* 202 F.2d 750 (2d Cir. 1953), *cert. denied,* 346 U.S. 822 (1953). Similarly, the criminal provisions of the Code are obviously punitive in nature and subject a taxpayer who has committed fraud to severe

sanctions whether or not he chooses to file an amended return, provided the Government has acted within the six year period of limitations. *See,* 26 U.S.C. §7201 *et seq.*

Any possible doubt concerning the non-punitive nature of Subsection 6501(c) is resolved by the fact that the suspension of the limitations period for a taxpayer who willfully and with intent to evade the tax fails to file a return terminates when the taxpayer files an honest return, even if that honest return is filed after commencement of a tax audit by the Government. *Bennett* v. *Commissioner.* It is undisputed that under such circumstances filing of the amended return results in the commencement of a period of limitations provided in Subsection 6501(a). *Bennett* v. *Commissioner.*

It is inconceivable that Congress would utilize the suspension of the statute of limitations as a punitive measure for persons who file a false or fraudulent return but not for persons who fraudulently attempt to evade the payment of tax by willfully failing to file any return at all. The distinction which the Government attempts to create between Subsections 6501(c)(1) and (c)(3) simply does not manifest itself in the legislative history.

From 1921 until the adoption of the 1954 Code the substance of those two subdivisions was included in one sentence of a single subsection of the income tax laws.[7]

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[7] *See, e.g.,* Section 276(a) of the Code which reads as follows:

> "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time"

The Committee Reports to the 1954 Code discuss the substantive changes to the 1939 Code provisions that were included in Section 6501 of the 1954 Code. S.Rept. No. 1622, 83d Cong., 2d Sess. 583-585 (June 18, 1954); H.R. Rept. No. 1337, 83d Cong., 2d Sess., A413-A414 (March 9, 1954). No mention is made in those Reports of the separation into two subdivisions of the "failure to file" exception and the "false or fraudulent return" exception. Surely the illusory distinction which the Government must press to support its position would have been commented upon by either the House or Senate at the time that this apparent clerical change had been enacted, had such a change been as significant as the Government erroneously contends. The absence of such commentary in the legislative reports is strong evidence that the separation was solely stylistic and was intended to make no substantive change in the law.

That Subsections 6501(c)(1) and 6501(c)(3) are in *pari materia* and are therefore to be read with reference to each other is not truly an issue. *See Dowell* v. *Commissioner*. Even the opinion of the Third Circuit Court of Appeals, where the majority declined to follow the holding in *Dowell* agreed that the "failure to file" exception and the "false or fraudulent return" exception are in *pari materia*. *Badaracco* v. *Commissioner*, 693 F. 2d 298, 301, n.6. The stated basis for the Third Circuit's departure from the reasoning of *Dowell* is the parenthetical phrase contained in Section 6501(a): "(whether or not such return was filed on or after the date prescribed)." The majority opinion concluded that the addition of that phrase in the 1954 Code indicated a Congressional intent to treat differently taxpayers who failed to file and those who filed fraudulent returns. Petitioner respectfully submits that such a conclusion is unwarranted.

As is the case of the separation of former Section 276(a) of the 1939 Code into two separate subsections, the pertinent legislative history makes no mention whatsoever of the purpose underlying the insertion into Subsection 6501(a) of the parenthetical phrase. In fact, no such commentary was necessary since the courts, even prior to enactment of the 1954 Code, consistently held that the limitations period set forth in the predecessor statutes to Subsection 6501(a) commenced running on the date when by law the return should have been filed or from the date when the return was actually filed, whichever is later. *See, e.g., Automobile Club* v. *Commissioner*, 353 U.S. 180 (1957) (returns filed on October 22, 1945 for 1943 and 1944 commenced period of limitations on filing date); *Helvering* v. *Campbell*, 139 F.2d 865 (4th Cir. 1944).

If Congress had intended the result espoused by the majority of the Third Circuit, they would have so stated. Moreover, if Subsection 6501(a) was meant to deal with the exception relating to a failure to file, there would have been no need to re-enact Subsection 6501(c)(3). Thus, to accept the reading of the statute espoused by the Court below would violate a basic maxim of statutory construction which presumes that every provision of a statute is intended for some useful purpose and a statute should not be read to render certain provisions superfluous. *United States* v. *Marubeni American Corp.*, 611 F.2d 763 (9th Cir. 1980); *United States* v. *Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972). It is clear that the parenthetical reference in Subsection 6501(a) was intended to assist the reader in ascertaining the meaning of that section and not to evince a different treatment of those taxpayers who failed to file (Subsection 6501(c)(3)) and those who filed a false or fraudulent return (Subsection 6501(c)(1)).

Moreover, the practical result of incorporating into the parenthetical phrase of Subsection 6501(a) the interpretation adopted by the Third Circuit in *Badaracco* v. *Commissioner* is excessively drastic. For, under the law as espoused by the Court below, a taxpayer who attempts to evade the tax by fraudulently failing to file a return can terminate the suspension of the limitations period by filing a return at a later date, even if that later date is after indictment and conviction for criminal violation of the tax law. But if the attempt to evade tax was effected by filing a false return, the taxpayer can never terminate the suspension of that period by filing an amended return or by any other means, even if he repents and files an amended return at a time when the Government has no indication whatsoever that there has been wrongful conduct on the part of the taxpayer.

The legal issue presented by this comparison is not whether it is desirable to permit wayward taxpayers to terminate the suspension period—there is no dispute that a suspension caused by Subsection 6501(c)(3) can be so terminated. Rather, the narrow question presented is whether Congress is likely to have intentionally provided such disparate consequences to acts which are distinguishable only by a factual difference that has no substantive relevance. The 33-year parallel history of the two suspension provisions as integrated parts of a single statutory sentence makes it clear that the Congressional intent is contrary to the construction urged by the Government.

Faced with its own acquiescence in the logic of the opinion in *Bennett* v. *Commissioner*, and the fact that there is really no substantive difference between a failure to file and the filing of a false or fraudulent return, the Government argued to the courts below that there exists a distinction between an honest but "delinquent" return and an honest "amended" return.

The linchpin for this argument is that there is no statutory authority for the filing of an amended return. Such a proposition is without merit and amounts to a major exaltation of form over substance. While it is true that Congress has never fully provided statutory authority for the filing of amended returns, it cannot be seriously contended that amended returns are not an integral part of the procedures established by the Government for the reporting and payment of taxes.[8]

It is not only the Government which has accepted and in fact embraced the concept of the amended return. The courts have consistently treated such documents as part of the nation's tax structure to an extent that it may be fairly stated that a body of common law has developed surrounding their use. *See, e.g., National Refining Co. of Ohio,* 1 B.T.A. 236 (1924), *non-acq.,* IV-1 C.B. 4; *John P. Alkire Inv. Co.* v. *Nicholas,* 114 F.2d 607 (10th Cir. 1940); *Kaltreider Construction Inc.* v. *Commissioner,* 129 F.Supp. 228 (D. Pa. 1961). Moreover, amended returns have even been used by the Government as the basis for prosecution of criminal charges. *Neaderland* v. *Commissioner,* 52 T.C. 532 (1969).

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[8] For example, *see* Treas. Reg §§ 301.6211-1(a) [taking the tax shown on the amended return into account in determining the amount of tax deficiency], 301.6402-3(a) [requiring a claim for refund to be made by filing an amended return], 1.1034-1 (i)(2) [requiring the filing of an amended return to show the amount of gain recognized on the sale of a residence where the taxpayer fails to reinvest all of the proceeds of sale to purchase a replacement residence], 1.453-8(d)(3) [permitting the use of an amended return to revoke an election to report income on the installment method]. *See also,* Rev. Rul. 82-81, 1982-1 C.B. 109; Rev. Proc. 79-13, 1979-1 C.B. 494. The Commissioner provides printed forms for amended returns (Form 1040X for individuals and Form 1120X for corporations).

The only distinction between an "amended" return and a "delinquent" return as it relates to the issue at bar is the label which the Government puts on it. In each instance, the document represents the taxpayer's honest effort to rectify an earlier fraudulent attempt to evade the tax. The information contained in each return is of the same nature and in each instance it is the means by which the taxpayer has sought to supply the Government with the information necessary to enable a proper assessment to be made of the taxes due.[9]

The weakness of the Government's position with respect to the distinction between "amended" and "delinquent" returns can be illustrated by the following hypothetical situation: Mr. B files a fraudulent return on April 15 (a Friday). Over the weekend he has a change of heart and files an honest "*amended*" return on the following Monday, April 18. According to the Government, since the document Mr. B has filed on April 18th is to be classified as an "amended" return, the statute of limitations for the assessment and collection of the tax which may be due thereunder never commences. On the other hand, if Mr. B, with the same intent to evade tax, decides on April 15th not to file a return and thereafter had the same change of heart, his filing on April 18th of what the Government chooses to classify as a "*delinquent*" return would entitle him to the benefit of the three year limitations period. The proposition is so patently illogical as to defeat itself. As Judge Wilbur noted in *Klemp* v. *Commissioner:*

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[9] It is conceded that in the instant case, the Government accepted Petitioner's amended returns when filed by Petitioner in August 1973 (JA -76a).

> "Respondent would leave the statute open for that portion of eternity concurrent with the taxpayer's life, whether he lives three score and ten or as long as Methuselah. In most religions one can repent and be saved but in the peculiar tax theology of respondent no act of contrition will suffice to prevent the statute from running in perpetuity. Merely to state the proposition is to refute it, unless some very compelling reason of policy requires visiting this absurdity on the taxpayer." *Klemp*, 77 T.C. 201, 207 (concurring opinion).

Indeed, the effect of the Government's absurd proposition is not limited to the length of Mr. B's mortal existence. Under Subsection 6901(c)(1) of the Code, the Government can assess a liability against a transferee of Mr. B within 1 year after the expiration of the period of limitation for assessment against the transferor (Mr. B). Since, according to the Government's contention, there is no expiration of its power to assess against Mr. B, the one-year expiration period for assessing against his transferee will never commence to run. *See, Leo Kubik, Transferee*, 33 T.C.M. 302 (1974). Consequently, even years after Mr. B's death, the Government would not be barred from litigating such issues with the beneficiaries of B's estate or with the legatees of deceased beneficiaries. Such a result cannot be endorsed or sanctioned by this Court unless there exists the most explicit statement of Congressional policy dictating such a conclusion. No such statement of Congressional intent exists either in the legislative history or in the language of the statute itself. Therefore, the Government's contention that there exists a valid distinction between Subsections 6501(c)(1) and 6501(c)(3) for purpose of assessment must be rejected.

II. The language of Section 6501 expresses Congress' intent that the exception in Subsection 6501(c)(1) is applicable only so long as a false return is the only return filed, and that the three year limitation in Subsection 6501(a) commences upon the filing of an honest return.

The Third Circuit Court of Appeals found that Subsection 6501(c)(1) was, in essence, an unlimited statute of limitations. This contradiction in terms resulted from undue attention to three words in Subsection 6501(c)(1) —"at any time"—and a forced application of the "plain meaning" rule of statutory construction. The Court's attention did not focus on the plain meaning of the language employed in the remainder of Section 6501, nor the underlying intent of the statute.

Subsection 6501(c)(1) states:

> "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, *at any time*."

Taken literally, and without any reference to the remainder of the section, this subsection *may* be read as meaning that once the taxpayer has filed a fraudulent return there can never be a time limit for the Government to assess tax. However, a reading of the entire statute belies such an interpretation. Of course, the parallel subdivision, 6501(c)(3), contains the very same plain language—"at any time". Yet that very same language has been construed by the Tax Court to mean something entirely different and that construction was acquiesced in by the Government. *Bennett* v. *Commissioner*. Undaunted by the undeniable inconsistency of

its two positions, the Government presses a strained and unrealistic reading of Subsection 6501(c)(1).

The plain-meaning rule is in marked contrast to the controlling rule of construction that a statute must be interpreted according to its purpose, even if that requires the addition, deletion or substitution of language.[10] While many cases can be found where the plain meaning rule of construction is employed, more recent decisions of this Court have given greater weight and acceptance to the latter rule. *See e.g., Rose* v. *Lundy*, 455 U.S. 509, 516-518 (1982); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600 (1979). In *Chapman* the Court stated "[a]s in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." 441 U.S. at 608. In *Watt* v. *Alaska*, 451 U.S. 259 (1981), this Court recognized that any conflict between the two rules of construction must be resolved in favor of effecting Congressional intent notwithstanding the use of words which cause a contrary result when construed literally:

> "the plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists . . . The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." 451 U.S. at 266.

Even the zealous adherents to a "plain-meaning" rule are likely to agree that the plain language cannot control if it leads to a result that Congress did not intend.

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[10] *Qui Haeret in Litera Haeret In Cortice* ("He who considers merely the letter of an instrument goes but skin deep into its meaning") Black's Law Dictionary 5th Ed. 1979.

While the plain-meaning approach in the instant case does not result in the height of absurdity related by Blackstone in his Commentaries,[11] a strict adherence to that doctrine can result in patent inconsistencies, the principal one being the disparity in treatment of taxpayers who fraudulently fail to file a return and taxpayers who file a fraudulent return. *Compare Bennett* v. *Commissioner with Badaracco* v. *Commissioner.* Moreover, such construction permits the Government to forever suspend a Sword of Damocles over a taxpayer who at one time may have filed a fraudulent return, but who has subsequently recanted and filed an amended return providing the Government with all the information necessary to properly assess the tax. No reasoned rule of law can justify this unbridled delay of the commencement of the statute of limitations, nor support a legal theory that in practice punishes a taxpayer, like the taxpayer herein, who recants prior acts of alleged misconduct, and voluntarily comes forth and provides the Government with the information it needs to assess any tax due.

The Taxpayer allegedly filed false tax returns. As a corporation its management was subject to change, and after the filing of allegedly false returns, management sought to voluntarily rectify the situation by filing amend-

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[11] To take a time-honored example, consider the construction of a law adopted in Bologna, Italy a few hundred years ago "that whoever drew blood in the streets should be punished with the utmost severity". A question arose as to whether the law called for the punishment of a surgeon who opened a vein of a person who had fallen down in the street in a fit. The literal or plain terms of the statute clearly applied to the surgeon's actions, but the language of the statute, when read in light of common experience, strongly suggests that it was not aimed at medical treatment provided by a surgeon. The statute was deemed not to apply. *See Blackstone's Commentaries,* Vol. 1, p. 61 (8th ed. 1778).

ed returns. Taxpayer acted voluntarily and without any coercion from the Government whatsoever. Taxpayer was not the subject of any criminal investigation, and there was no reason to believe that it would be indicted for criminal tax fraud.[12] (JA -56a) Taxpayer's filing of the amended returns was a voluntary act undertaken to rectify past errors in judgment. To subject the Taxpayer, or any other taxpayer who voluntarily comes forth and files an amended tax return, to open ended liability cannot have been intended by Congress. The Congressional intent is clear that once the Government is given the information it needs to determine the taxes, some reasonable period of limitation for the assessment of that tax must be imposed. That reasonable period of limitations—three years—was the one selected by Congress in Subsection 6501(a). This Congressional intent has been held to dictate that the three year statute is applicable to the taxpayer who, having fradulently failed to file, comes forth (voluntarily or otherwise) and files a tax return which provides the government with information it needs to assess the tax. *Bennett* v. *Commissioner*. There is no reason to assume that Congress intended inconsistent application of this statute as between fraudulent nonfilers, who recant and file delinquent returns, and fradulent filers, who recant and file amended returns.

The inconsistency of treatment urged by the Government cannot be shrugged off as merely a peculiarity of statutory law. Such an explanation may be accepted only if there is clear evidence that Congress intended such result. As noted previously, the legislative history relative to Subsection 6501(c) is completely silent. Appar-

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[12] At the time Taxpayer filed its amended returns, any claim of criminal wrongdoing for the tax year 1966 had been barred by the six year statute of limitations applicable to criminal misconduct, and the statute was about to run on tax year 1967. See Subsection 6531(a) of the Code.

ently the effect of the filing of an amended nonfraudulent return on the period of limitation is a matter which Congress did not anticipate and which it never addressed. These circumstances, which are not uncommon, require an examination of the policies underlying the enactment. As this Court stated in *Rose* v. *Lundy*:

> "In 1948, Congress codified the exhaustion doctrine in 28 U.S.C. Section 2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion. Section 2254, however, does not directly address the problem of mixed petitions. To be sure, the provision states that a remedy is not exhausted if there exists a state procedure to raise 'the question presented', but we believe this phrase to be too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions. Because the legislative history of Section 2254, as well as the pre-1948 cases, contains no reference to the problem of mixed petitions, in all likelihood Congress never thought of the problem. Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) ('In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy' (citations omitted)); *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969) ('where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose' (citations omitted)); *United States* v. *Sisson*, 399 U.S. 267, 297-298 (1970) ('The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances

> not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed'); *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953) ('Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved.')." 455 U.S. at 516-18.

The policies underlying Section 6501 dictate against acceptance of an overly literal reading of Subsection 6501 (c)(1). Moreover, in this case there is no conflict between the plain meaning rule and a construction which relies on Congressional intent. For a reading of all of the language of Section 6501 reveals that Subsection 6501 (c)(1) is only an exception to the three-year limitation made generally applicable by subsection 6501 (a). In fact, all of Subsection 6501(c) is denominated in the body of the statute as "EXCEPTIONS—" to Subsection 6501(a). Thus, Subsection 6501(c)(1) is clearly not, as the Government would have this Court concluded, a self-contained statute of limitations, whose meaning can be ascertained from a reading of the Subsection without consideration of the plain meaning of the entire section. Rather, it is exactly what the plain language of the statute says it is, an "*exception*" to the limitation period provided in Subsection 6501(a).

Subsection 6501(c)(1) is not a statute of limitations. Congress expressly enacted it as an exception to the statute of limitations in Subsection 6501(a). It is the antithesis of a statute of limitations, which under specified circumstances only postpones the commencement of the three-year limitations period. Subsection 6501(c)(3) is of an identical nature to (c)(1), and for the most part contains identical language. It also is not a statute of lim-

itations, but rather an exception to the statute. As an antithesis of a statute of limitations, Subsection 6501 (c)(3), under circumstances slightly different than those to which (c)(1) must be applied, also only postpones the commencement of the limitation period. Subsection 6501 (c)(3) suspends the period of limitation "in case of failure to file a return". Thus, *so long as* there is a failure of the taxpayer to file a return, the Government may assess the tax "at any time". However, when the delinquent taxpayer files a return (voluntarily or otherwise), the exception to the general limitation period is no longer applicable, and the three year period of limitation begins to run. The Government has so conceded. *Bennett* v. *Commissioner*. Likewise, the exception to the general period of limitation in Subsection 6501(c)(1) is applicable *so long as* the taxpayer has only filed a false or fraudulent return. When the taxpayer files an amended return which reveals his actual income, deductions and credits, the provisions of Subsection 6501(c)(1) cease to be applicable, and the limitation period may no longer be postponed. Thus, under the over-all statutory scheme, once an honest delinquent or an honest amended tax return has been filed, the exceptions in Subsections 6501 (c)(1) and 6501(c)(3) to the general statute of limitations in Subsection 6501(a) cease to apply, and "[t]he tax cannot be assessed at any time under Section 6501(c) of the code, but must be assessed within the three-year period of limitation provided in Section 6501(a)." Rev. Rul. 79-178, 1979-1 C.B. 435.

The Government's so-called plain meaning construction of the language "at any time" is further eroded, when other uses of that very language are analysed. As previously indicated, in its acquiescence in *Bennett* v. *Commissioner* the Government implicitly conceded that "at any time" in Subsection 6501(c)(3) really means *so long as no*

delinquent return is filed. Thus the plain meaning of "at any time" may no longer be viewed as quite so plain.

Similarly, an overly literal construction of the words "at any time" was rejected by the Fifth Circuit in *Wolff* v. *United States*, 578 F2d 1103 (5th Cir. 1978), a case which involved the construction of another closely related subdivision, Subsection 6501(c)(2). That subdivision is yet another exception to 6501(a), and likewise postpones commencement of the running of the three-year statute "[I]n case of a willful attempt . . . to defeat or evade" taxes other than income, gift or estate taxes. In Subsection 6501(c)(2) the tax may also be assessed "*at any time*". This exception is almost identical to Subsection 6501(c)(1), since the (c)(2) requirement of willfulness and the (c)(1) requirement of intent are indistinguishable. In *Wolff* v. *United States* the Fifth Circuit considered the impact of the subsequent dissipation of the taxpayer's demonstrated willfulness, (i.e., intent) to evade tax, which willfulness existed at the time of the original filing. That Court determined that upon a filing of an amended return and a showing that the taxpayer's willful intent to evade tax had ended, the general three-year limitation would once again control. Thus in the case of another exception to Subsection 6501(a), the plain language "*at any time*", was held to really mean "*so long as the willful intent continues*", as demonstrated, for example, by the filing of an amended, nonfraudulent return. Clearly, the Fifth Circuit has recognized that "at any time" must not be given the literal construction urged by the Government herein.

The Government also attempts to justify its position by focusing on the unimportant, if not non-existent, issue of "original" returns as opposed to "amended" returns. The Government argues that once an original return is

filed, the parties' rights and obligations become fixed in stone and an unlimited statute of limitations becomes effective forever. The controlling determination is not whether a return is original or amended, but whether it is a return at all.

Initially, it must be noted that the terms "original" and "amended" do not appear in Section 6501.[13] Thus, when the Government contends that the controlling factor is whether a return is original or amended, it attempts to draw attention to a non-issue, rather than a determination of whether the returns fit within the descriptive terminology employed by the Congress.

In describing the documents which may be filed by a taxpayer, Section 6501 uses only the terms "the return", "false return" and "no return". The language in Subsections 6501(c)(1) and (3) which permits the tax to be assessed "at any time" must not be construed in conjunction with the words "original" and "amended" return,

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[13] In fact, the one provision of the Code which mentions "amendments" to returns, I.R.C. §6213(g)(1) (1976 & Supp. IV 1980) defines "return" for the purposes of §6213 as "any return, statement, schedule, or list, and any amendment or supplement thereto . . ." The legislative history indicates that this definition was included to insure that the Commissioner reviewed all supporting schedules for "mathematical errors" before assessing deficiencies through summary proceedings. *See* H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 289-93 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 375-387 (1976). Therefore nothing in the legislative history indicates that Congress explicitly excluded the acceptance of amended returns by the Internal Revenue Service. *See, e.g.* Treas. Reg. §§301.6211-1(a), .6402-1(a)(5) (1982). When the Government has accepted ameded returns, as in this case, the courts have given them effect. *E.g., United States* v. *Samara*, 643 F2d 701, 704 (10th Cir.) *cert. denied*, 454 U.S. 829 (1981); *Bookwalter* v. *Mayer*, 345 F2d 476, 480 (8th Cir. 1965).

as the Government submits, but rather in conjunction with those phrases which do appear in the statute.

When a taxpayer files a "return", the three-year limitation in Subsection 6501(a) is applicable. It is also quite clear that when the taxpayer files "no return," by operation of Subsection 6501(c)(3), the three-year statute does not commence to run. However, when he thereafter files a "return", the three-year limitation period commences. *Bennett* v. *Commissioner.* The reason for this is not, as the Government contends, that the delinquent return is an "original" return, but because it is a "return" which "evinces an honest and genuine attempt to satisfy the law". *Zellerbach Paper Co.* v. *Helvering,* 293 U.S. 172, 180 (1934). While that case involved circumstances which were distinguishable from those in the case at bar, Justice Cardozo's analysis and decision are particularly instructive, since he recognized that a return is a return for statute of limitations purposes when it evinces an "honest and genuine" endeavor to advise the Government of the taxpayer's true income, deductions, and credits. Concommitantly, when a purported return does not do so, it is a "false" return, *i.e.,* no return at all, for statute of limitations purposes. *See Dowell* v. *Commissioner.*

Reflecting on the language of the other exception to the general three year period of limitation, the "false return" (Subsection 6501(c)(1)), Justice Cardozo's analysis leads to the conclusion that the filing of a "false return" has no effect whatsoever on the period of limitation for assessment. By implication Justice Cardozo advised that a "false return", one which does not evince an honest intent to comply with the law, is no return at all. This is absolutely consistent with Webster's Dictionary, which defines the word "false" as: "counterfeit; not genuine or real; artificial." *Webster's New Twentieth Century Dictionary of the English Language* (Unabridged 2nd Edition (1971). Under

this definition a "false return", as the phrase was used by Congress in Subsection 6501(c)(1), refers to a "*counterfeit*" return; "*not a genuine*" return; "*not a real*" return. Thus, when Congress enacted the "false return" exception to the three-year limitation, it did so in recognition of the fact that, for limitations purposes, a "false return" by its commonly accepted definition is not a return. Likewise, by enacting (c)(1) as an exception to the general rule, Congress evidenced an equally clear intent that the filing of a "return", *i.e.*, an honest return, whether it is called an "original" return, a "delinquent" return or an "amended" return, triggers the three-year limitation period which is applicable to all honest returns.

In sum, the Government's reading of Section 6501 is inherently flawed as it requires for its fundamental validity the elevation of Subsection 6501(c)(1) to the status of a self-contained statute of limitations (albeit an unlimited one) standing separate, apart and different from the remainder of Section 6501. This argument was rejected by the Tenth Circuit in *Dowell*, the Second Circuit in *Britton* and by the entire Tax Court in *Klemp*, and is in direct contradiction with the holding in *Bennett*, and the Government's acquiescence therein. Furthermore, Congress could not have intended that it would make a difference if "the return" under Subsection 6501(a) is an amended return as opposed to a delinquent return; for in either case, the taxpayer who supplies the Government with information that satisfies *Zellerbach* has filed the return contemplated in Subsection 6501(a) and has satisfied the condition precedent for the commencement of the period of limitations. The contrary position espoused by the Government, that a taxpayer who files a fraudulent return forever foregoes the opportunity to file "the return" under Subsection 6501(a), is undermined by the totality of the language of Section 6501 and by the Government's acquiesence in *Bennett* v. *Commissioner*, and should not be accepted by this Court.

III. The policy contentions urged by the Government are unavailing

In its response to the Petition for a Writ of Certiorari and in the lower Courts, the Government pressed certain alleged "policy" considerations in support of its contention that it needed an open-ended assessment period. Two of these arguments focus on the internal mechanisms and procedures of the Internal Revenue Service, and the third such argument was based on Subsection 6501(e)(1) of the Code.

Each such consideration advanced by the Government is superficially attractive but does not withstand careful analysis. Moreover, each assertion of policy suffers from a fatal flaw, for each is as equally applicable to the situation presented in *Bennett* v. *Commissioner*, involving a fraudulent failure to file, as it is to the instant case. While the Government contends that its internal procedures may suffer if the position urged by Taxpayer is upheld by this Court, the Government cannot truly identify a single policy consideration which is persuasive enough to justify so disparate a treatment between the taxpayers in *Bennett* and the Taxpayer in the instant case.

Specifically, the three policy contentions which were cited with approval by the Third Circuit are: (1) the duality of civil and criminal proceedings; (2) the difficulty of proving fraud; and (3) the alleged anomalous treatment of taxpayers who omit substantial income from their returns, as opposed to those who file fraudulent returns. Petitioner shall address each of these *seriatim*.

1) The duality of civil and criminal proceedings.

The Government urges that upon the filing of a fraudulent return, it should be permitted to delay civil assess-

ment for that period of time during which criminal proceedings or investigations are pending (Respondent's Rule 22 Brief pp. 9-10). This policy argument has no application to the Petitioner or to the issues presented by this Petition, as Petitioner was *never* the subject of any criminal proceeding or investigation.

Although it has been previously stated, Petitioner must again point out that it came forward and voluntarily filed its amended returns without any pressure from the Government, prior to *any* action by the Government (JA - 56a).[14] There was no inquiry or investigation into Petitioner's tax returns prior to its voluntary filing of its amended tax return.[15] Petitioner suggests that a taxpayer who voluntarily comes forth and files an amended tax return, in an honest attempt to rectify past errors, should

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[14] In contrast, in *Bennett* v. *Commissioner*, the taxpayers, who intended to fraudulently evade payment of their taxes filed a delinquent return only after commencement of an audit by the Government. In *Dowell* v. *Commissioner*, the taxpayers were subject to criminal investigation before the amended returns were filed and were thereafter convicted under 26 U.S.C. §7206(1) of willfully filing false tax returns. *United States* v. *Dowell*, Cr.No. 70-85 (W.D.Okla., 1970), *aff'd.*, 446 F.2d 145 (10th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); in *Klemp* v. *Commissioner*, the taxpayers had been notified by the Government prior to the filing of their amended returns that their returns were to be audited. 77 T.C. at 202. Criminal convictions were also obtained against the taxpayers in *Britton* v. *United States*, and in the consolidated companion case to the instant proceeding, *Badaracco* v. *Commissioner*, 693 F2d at 300.

[15] The majority opinion of the Third Circuit in *Badaracco* v. *Commissioner* erroneously states with respect to Petitioner that "lengthy criminal and civil investigations" occurred following Taxpayer's filing of amended returns in August of 1973 (PA -4a). 693 F2d 300. That statement is unfounded and cannot find support in any portion of the record below.

not be subject to never-ending assessment to satisfy the Government's concern with its "policy" relating to the enforcement of the criminal tax statutes, especially when that policy is totally inapplicable to the taxpayer. Further, to afford such a taxpayer harsher treatment than that afforded to the taxpayer in *Bennett,* who willfully sought to evade his tax obligations by failing to file any tax returns, and then filed a delinquent return only after the commencement of a Government investigation, is neither reasonable nor rational.

Moreover, even as a general proposition the Goverment's argument is unavailing. The Government argues that once it refers a case for criminal prosecution it no longer has available to it the summons procedure authorized under Section 7602. *United States* v. *LaSalle National Bank,* 437 U.S. 298, 308-309 (1978). Therefore, it should be permitted to wait until resolution of the criminal proceeding before being required to commence its civil assessment procedure. This argument is wanting in several respects. Presumably the Internal Revenue Service does not refer a case to the Department of Justice for criminal prosecution until it has collected substantial evidence of fraud. Additionally, it must be noted that in any criminal proceeding for tax evasion the Government must necessarily prove the elements of the civil deficiency if it is to establish criminality.

The only real problem which the Government may face with respect to simultaneous criminal and civil proceedings is the opportunity presented to the taxpayer to obtain in the civil arena that which it could not obtain in the criminal proceeding. The problem, however, does not justify the extreme position espoused by the Government, i.e., that it be permitted to wait forever before instituting civil proceedings—particularly since the Government

is not without other remedies. The Government can request and in many instances the taxpayer will agree to extend the period of limitations under Subsection 6501 (c)(4). Moreover, even if the taxpayer refuses to agree to extend the limitations period the Government may properly seek relief from the courts. This is exactly what occurred in *Campbell* v. *Eastland*, 307 F.2d 478 (5th Cir. 1962). In *Campbell* the Government was party to a civil case while a criminal investigation was pending based on the same facts. The Fifth Circuit did not bar the civil proceeding nor did the Government ask that it do so. The Court of Appeals did, however, protect the Government against the danger upon which it premises this argument. Thus, the Court prevented the taxpayer from using the civil case as a means of obtaining discovery that could not have been obtained in the criminal proceeding. Petitioner submits that the holding in *Campbell* illustrates that the Courts can afford the Government ample means to prevent a taxpayer from abusing the civil process to obstruct criminal prosecution should such a case arise.

Moreover, the problem of which the Government complains is equally applicable when a taxpayer fails to file a return in order to defeat the tax. When such a taxpayer subsequently files his honest delinquent return, the three-year period of limitations commences to run notwithstanding that the Government may have elected to go forward with a criminal prosecution. *Bennett* v. *Commissioner*. Obviously the very same "policy" consideration present in the fraudulent failure to file situation is present in a false filing case. Indeed, the investigation in the false filing situation is likely to be more difficult since the Government does not have the benefit of two contradictory returns subscribed and sworn to by the taxpayer. Yet, the Government has already embraced the rationale of *Bennett* in Rev. Rul. 79-178, 1979-1 C.B. 435.

Petitioner submits that the Government's inconsistent positions strongly indicate that its concerns with respect to the difficulties of simultaneous civil and criminal proceedings are simply not persuasive.

2) The difficulty of proving fraud.

The Government contends that because it must prove fraud in a civil case by clear and convincing evidence, it should not be limited to a three year period for civil assessment after a non-fraudulent amended return is filed. The Government further contends that its burden is not significantly reduced when it receives an accurate amended return for the taxpayer (Respondent's Rule 22 Brief p. 10).

The validity of the Government's assertion suffers from the rather obvious fact that upon the filing of an amended return, the Government has the benefit of an honest return which it can compare and contrast with the original fraudulent return. The contrast between the amounts set forth in the fraudulent return and the modification made by the amended return typically will be of considerable aid to the Government in meeting its burden of proof, even in a criminal proceeding where the Government's burden is even greater. For example, in *United States* v. *Rischard*, 471 F.2d 105 (8th Cir. 1973), the taxpayer's amended returns were utilized by the Government to prove a pattern of consistent understatement of income which was held to be "persuasive evidence of willful intent" 471 F.2d at 107.

What truly undermines the Government's argument, however, is its very position as expressed in Rev. Rul. 79-178, 1979-1 C.B. 435. This ruling re-stated the Tax Court's decision in *Bennett* v. *Commissioner*. The facts presented in that ruling were as follows:

> "The taxpayer willfully failed to file a 1974 tax return in order not to pay income tax due. During the Service investigation, the taxpayer filed a correct, but delinquent, 1974 return on June 1, 1976. On completion of its investigation, the Service determined that the taxpayer was subject to the civil fraud penalty under section 6653(b) of the Code for failure to pay tax."

The Government's holding was as follows:

> "The tax cannot be assessed at any time under section 6501(c) of the Code, but must be assessed within the three-year period of limitations provided in section 6501(a)."

Petitioner submits that the Government's own ruling is dispositive of this argument. In case of a false filing the burden of proving fraud obviously is reduced to some extent due to the simple fact that the Government has in its possession two separate contradictory documents, each subscribed to by the taxpayer. In the situation presented in *Bennett*, and reflected in the above ruling, the Government has only the single document, the "delinquent" return. Unquestionably the Government's problem in establishing the requisite intent to defraud by clear and convincing evidence is even greater when it has only one return than in the case where it has two conflicting returns. Petitioner cannot explain the basic inconsistency in this approach and submits that neither can the Government.

3) The six year limitations period of Subsection 6501 (e) (1)(A).

The Government has also put forth a supposed policy argument based upon Subsection 6501(e)(1)(A) which provides that a taxpayer who omits an amount in excess of twenty five percent of his gross income from his return is subject to a six-year period of limitations. The courts have held that this period is not reduced by the filing of an amended return. *Houston* v. *Commissioner*, 38 T.C. 486 (1958); *Goldring* v. *Commissioner*, 20 T.C. 79 (1958). The Third Circuit noted the application of Subsection 6501(e)(1)(A) and concluded that it would be inappropriate for persons who filed an allegedly fraudulent return to be placed in a "better" position than those who made a substantial but non-fraudulent omission on their returns. *Badaracco* v. *Commissioner*, 693 F.2d at 302.

This conclusion ignores essential considerations. Subsection 6501(e)(1)(A) is not an exception to the three year limitation contained in Subsection 6501(a). Rather, it is a self-contained substitute statute of limitations and has no relationship to Subsection 6501(a) or 6501(c). *Klemp* v. *Commissioner*, 77 T.C. at 206. In fact Subsection 6501(e) expressly provides that it does not apply whenever one of the exceptions of Subsection 6501(c) is involved.

In its original decision in *Dowell* v. *Commissioner*, 68 T.C. 646 (1977), *rev'd*, 614 F.2d 1263 (10th Cir. 1980) the Tax Court placed significance on its holdings in *Goldring* v. *Commissioner*, and *Houston* v. *Commissioner*, in which the returns contained an omission of more than 25% of gross income. In each case the Tax Court held that the subsequent filing of an amended return not containing such an omission did not shorten the already existing limitations period under the statutory predecessor

of Subsection 6501(e)(1)(A). The Tax Court held that the amended returns could not "relate back" to the original returns and shorten the special lengthened assessment period that began upon the filing of such returns. In neither case, however, did the Court consider the question of whether the filing of amended returns could begin the three year period of limitations under the predecessor to current Subsection 6501(a). The rejection of the position urged by the taxpayers in *Goldring* and *Houston* was based upon the theory that its adoption might deprive the Government of the full statutory period to review a return. That is definitely not a danger in the instant case, for there is no doubt that the Government had the benefit of the full three year period provided under Subsection 6501(a) to review and assess after the filing of Taxpayer's amended returns.

Further, the distinction which is ignored by the Government, between filing an amended return for purposes of Subsection 6501(e)(1)(A) and Subsection 6501(c), is basic. In the former situation the filing of an amended return would *shorten* a statute of limitations which is already running. In the latter situation, the period of limitations has not commenced since a fraudulent return or a failure to file commences nothing. By filing a non-fraudulent "delinquent" or "amended" return, the taxpayer does not alter an extant limitations period. Rather, the taxpayer seeks to start a period of limitations.

Another major consideration which the Third Circuit ignored is the extremely drastic penalties which may be visited upon a taxpayer who files a fraudulent return or fraudulently fails to file. Had these been considered there could be no justification for the statement that a taxpayer who files a return for which Subsection 6501(e)(1)(A) is applicable is in a better position than one who files

a fraudulent return under Subsection 6501(c)(1). As already noted, the taxpayer who omits 25% of income from his return does have the benefit of a statute of limitations. The taxpayer whose return is subject to Subsection 6501(c)(1) receives no such benefit. Only when such a taxpayer files an honest and complete amended return, does he receive that limited benefit. But the filing of the amended return does not remove the possibility of criminal prosecution or the imposition of the 50% civil fraud penalty. Indeed, the very act of filing amended returns has probably heightened such possibilities.

The overwhelming severity of indictment and conviction for tax fraud need no elaboration. Even if the taxpayer files the amended returns subsequent to the expiration of the six-year statute of limitations for criminal prosecution, he has given the Government strong evidence to press the imposition of the 50% civil fraud penalty available under Section 6653(b). The severity of this sanction is highlighted by the fact that if fraud is found to exist in any part of the return, the civil fraud penalty applies to the entire deficiency, *Goldberg* v. *Commissioner*, 239 F.2d 316 (5th Cir. 1956), and the penalty even survives the taxpayer's demise, *Kirk* v. *Commissioner*, 179 F.2d 619 (1st Cir. 1950).

Petitioner submits that the so called policy considerations advanced by the Government are illusory. Moreover, even were they persuasive, they must yield to basic overriding concerns. Despite the vast bureaucratic machinery available to the Government, it is beyond doubt that the tax system of the United States is for the most part dependent upon voluntary self-assessment by its taxpayers. *Lucia* v. *United States*, 474 F.2d 565 (5th Cir. 1973). In the case at bar, a voluntary self-assessment resulted in Taxpayer coming forth and filing its amended

return, giving the Government all the information it needed to assess any tax due. For over six years after the filing of these returns, the Government took no action to assess the tax. Then, after that considerable period of time had passed, the Government sought to assess the tax, saying in effect to Taxpayer—since your alleged wrongdoing was the filing of a false tax return instead of attempting to evade the tax by fraudulently failing to file, you are not entitled to avail yourself of the general statute of limitations provided by Congress to all taxpayers who give the Government the information it needs to assess, even though you came forward voluntarily and filed your amended return without any pressure from us. The enunciation of such a policy by the Government not only results in punishment for those who reassess their prior acts and voluntarily come forth and file amended returns, but also places a premium on silence —elevating one form of tax fraud over another—for it suggests to those citizens who would commit tax fraud that it is better to remain silent and gamble on nondetection than to repent and confess all by filing an amended return.

If Taxpayer has initially run afoul of its duty of self-assessment, Congress has provided the most severe sanctions to penalize such conduct. Those sanctions are embodied in the penal provisions of the Internal Revenue Code, and in the imposition of the fraud penalty under Section 6653(b). The Government seeks to add yet another penalty without the slightest indication that Congress intended to do so. The Government would consign Taxpayer to the never ending limbo of a period for governmental assessment that lasts until eternity and beyond.

CONCLUSION

Petitioner submits that for the reasons hereinabove stated the filing of an honest amended tax return commences the running of the statute of limitations provided in Subsection 6501(a). Therefore, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the judgment of the United States District Court for the District of New Jersey in favor of the Petitioner be reinstated and affirmed.

Respectfully submitted,

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